CASHIERING

AND

DISMISSAL.

In the articles of war of 1806, and the act of March 3d, 1865, chap. 79, Sec. 18, which is embodied in the Revised Statutes as the third of the articles now in force, four different terms were used to designate the expulsion of a commissioned officer from the army by sentence of general court-martial, viz: cashiering, displacement, discharge, and dismissal, or, as the act cited has it, "dishonorable dismissal." Of these cashiering was mentioned as a penalty ten times; displacement, once; discharge, once, and dismissal, three times. In the new articles only two terms are used, dismissal thirteen times, and cashiering twice; the latter punishment being now specially affixed only to the making of a false return under the 8th article, and the receiving and entertaining of a deserter under the 50th. By this slender link, therefore, the term "cashiering" is retained in the vocabulary of our statutory military law.

In view of these changes, two questions suggest themselves:

1. Is there any difference, in our service, between cashiering and dismissal? For, if there is, the Revised Statutes have changed the law.

2. If no such difference exists, are the two terms equally appropriate, or is one to be preferred?

It has been held that "a sentence of cashiering has, by well established practice, the same legal effect as a sentence of dismissal." Holt's Digest, p. 78. Nevertheless, an impression to the contrary seems still to prevail in our service, and sometimes finds expression in a sentence awarding both cashiering and dismissal. This impression is founded partly on the fact that in the country from which we derive the greater part of our military law, the two have, in general, not been considered identical by the writers on that subject, and partly on the language of the 17th Article of War [o. s.] By this article an officer convicted of making a false muster was to be *cashiered*, and "thereby utterly disabled to have or hold any office or employment in the service of the United States;" this disqualification for holding any future office, or, more correctly, any office in the military service, being what was supposed to distinguish cashiering from dismissal. But it is to be observed that the article attached disqualification only to cashiering for *making a false muster*—not to cashiering generally. If there were any doubt on this point, it would necessarily be removed by the 16th article, by which the same consequences were made to follow "displacement from office" for offences under it. Now, by the 5th, 6th, and 14th of the new articles, which correspond with the 15th, 16th, and 17th of the old, the punishment is "dismissal," instead of, as formerly, "cashiering" and "displacement," and the disqualification is attached to *that*.

These are the only instances in which the articles of war expressly impose disqualification for future office. The Government, however, at one time proceeded upon the understanding that every sentence of simple cashiering or dismissal carried with it a disability for future office, which required an express exercise of the pardoning power for its removal. The orders published by the War Department in 1866, (without going further) contain a number of instances of such pardons, and in a printed letter addressed in 1871 to an officer who had been cashiered and dismissed, the department gave its views quite fully, holding that the "removal of disability," which had been granted, was an exercise of the pardoning power, being a decla-

ration and assurance by the Executive that he might again be accepted into the service of the United States.

Simmons [on Courts-Martial, 6th ed., p. 58] mentions amongst the sentences applicable to commissioned officers, *Discharge with ignominy; Cashiering, accompanied* by a declaration that the prisoner is unfit, or unworthy, or totally unfit and unworthy to serve in any military capacity; to which has sometimes been added that the prisoner's sword be broken over his head; *Cashiering* simply; and *Dismissal.* He calls attention to the marked difference existing between the sentences of cashiering and dismissal, as shown by the action of the reviewing authority in the case of Captain Barnes, 89th Regiment, in declining to give effect to the recommendation of the court, further than "to mitigate the term of cashiering into that of dismissal from His Majesty's service." But neither Simmons, nor, it is believed, any other English writer on military law, except Hough, attempts to show what the difference is. In fact, scarcely any two agree in their classification of this kind of punishment. Pipon and Collier speak of cashiering with incapacity to serve; cashiering simply; and dismissal; but not of discharge with ignominy. Tytler mentions only cashiering *simpliciter*, and cashiering with a declaration of unfitness for future service. According to Samuel an officer might be cashiered or dismissed, either by sentence of court-martial, or by the King, in which latter case the act did not necessarily involve discredit.

Grose (Mil. Antiq.) defines cashiering as "a dishonorable dismission of an officer or soldier." As applied to the officer, it is, he says, of three degrees. The first is simply a dismission of an officer from his employment, by a letter from the Secretary of War to him, signifying that His Majesty has no further occasion for his services,* or by the sentence of a court-martial, whereby he is sentenced to be cashiered.

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* This, however, is not always the form of expression used, officers having been, according to circumstances, "displaced," "directed to retire," "informed that their services could be dispensed with," or had their names "erased from the list of the army."

The second is dismissing an officer from the service, and rendering him incapable of serving for the future in any military capacity; and,

The third is dismission with infamy, and degradation from the rank of a soldier and a gentleman—a sentence, the execution of which was attended, according to Grose, with many ignominious circumstances, more terrible to a man of feeling than death itself. He describes as follows the manner in which such a sentence was executed upon an officer convicted of cowardice at the battle of Falkirk, 1745: "The line being ordered out under arms, the prisoner was brought to the head of the eldest brigade, completely accoutred, when, his sentence being read, his commission was cancelled, his sword broken over his head, his sash cut in pieces and thrown into his face, and lastly, the provost marshal's servant giving him a kick on the posteriors, turned him out of the line." In our own country we had in 1778, an instance of an officer "dismissed the service with infamy," and ordered by Washington to be drummed out of camp "by all the drums and fifes in the army."

This question of the legal effect of cashiering and dismissal was fully discussed in a case tried in India in 1820. Major W. J. M., 9th Regiment N. I., having been sentenced "to be dismissed the service," for false musters, the Commander-in-Chief (Hastings) called the attention of the court to the fact that it had deviated from the letter and the spirit of the law, for "to be dismissed" were not the words used by the statute and the articles of war; and that the punishment conveyed by these words did not amount to the penalty of "cashiering," which super-added to dismissal disqualification for future employment. Although the views expressed by the court, on reassembling, were not concurred in by the reviewing authority, they are given in full as containing a clear statement of that side of the question:

"To Captain J. Bryant, J. A. G.

"Sir: 1. I am directed by the court-martial assembled for the trial of major M., to submit to you, for the information of the Most Noble the Commander-in-Chief, the grounds and

reasons upon which they consider that they would have been justified in adhering to their sentence, inasmuch as it is, in their judgment, conformable to the spirit and letter of the military act.

"2. It appears to the court that the penalty inflicted by the word '*dismissal*,' is the same in all respects with that inflicted by the word '*cashiering*,' the two words being perfectly synonymous, and that, therefore, the use of the one and the other is altogether arbitrary and indifferent.

"3. In support of this opinion, the court beg leave, respectfully, to refer to all dictionaries and books on military law, wherein the meaning of the two words can be explained or illustrated. In the 30th article of the 16th Sec. the text says, that the offender therein described, '*shall be discharged from our service*,' and the marginal summary on the same article says that '*he shall be cashiered*,' importing that the successive compilers of the articles have in all times considered the two expressions to be equivalent. In the case of Captain J. Coffin, tried for false musters, as reported by McArthur, the sentence was illegal, because Captain Coffin was only adjudged to be '*dismissed the ship*.' 'Soon after,' says McArthur, 'the Lords Commissioners of the Admiralty, under the administration of Earl Home, took into consideration the supposed lenity of this sentence, and conceiving it was deficient by not inflicting the punishment of *cashiering* or *dismissal* from His Majesty's naval service, agreeably to the tenor of the 31st article of war, under which the offence had fallen, their Lordships thought proper to add to the punishment adjudged by their sentence, and accordingly effaced his name from the list of captains, and thereby rendered him incapable of further employment in H. Majesty's service.' It is evident that in the opinion of McArthur, and, apparently, in that of the Lords Commissioners of the Admiralty, the court would have complied with the letter of the law if they had sentenced Captain Coffin *to be dismissed the service*, agreeably to the tenor of the 31st article of war, in which, however, the word used is *cashiered*. In the next page McArthur says: 'We find, likewise, that in military courts-martial the articles of

war define the express punishment of *cashiering* or *dismissal* from H. Majesty's service for certain offences nearly similar to those enumerated in the naval articles, but of greater variety and extent.' And these he proceeds to specify: 'false musters or signing false muster rolls.'

"4. It appears to the court that disqualification for future employment is not super-added by the mere use of the word *cashiered.* If future disqualification were included in the term cashiered, it would not be expressed in some of the articles as an additional penalty, and omitted in others. It is omitted in the second article of Sec. IV, and in article 29th of Sec. XVI, but in article 3d of Sct. IV, it is said that the offender '*shall be cashiered, and suffer such other penalty as he is liable to by the act for punishing mutiny and desertion,*' which other penalty is expressed in Sec. XLIV, viz: '*that he shall be displaced from his office, and shall be thereby utterly disabled to have or hold any civil or military office or employment within the United Kingdom of Great Britain and Ireland, or in H. Majesty's service.*'

"The same disability is also expressly super-added to the penalty of being cashiered in some of the naval articles, and in others it is omitted. In like manner courts-martial have occasionally thought it necessary to declare the disability in addition to their adjudication of cashiering, and in other instances they have abstained from the mention of it. They declared it in the cases of Lord G. Sackville and General Whitelocke, and they did not declare it in the case of Lieutenant-colonel Johnstone of the N. S. W.'s regiment. The authority of Tytler on this point is very full and strong. He says '*cashiering* is sometimes done simpliciter, that is, without carrying in the sentence any judgment against the offender of incapacity to be restored afterwards to his military character, or with the addition of a judgment of the court declaring the offender unworthy or unfit to serve H. M. in any military capacity; which is the highest of the subordinate punishments that can be inflicted on a commissioned officer.'

"5. But though for some offences, as for mutiny or misconduct in the field, with conviction of which the law has not inseparably connected disqualification for future employment, it may be proper expressly to assert such disqualification; yet in the case of false musters the court are of opinion that it is unnecessary, because the disqualification attaches as a legal consequence of being convicted of, and *cashiered* or *dismissed* for, such offence; the offender being '*thereby utterly disabled to have or hold*, &c., according to the tenor of Sec. XLIV.

"6. At the same time the court respectfully submit, that the disability in question, whether expressly declared, or tacitly induced as a legal consequence, though announced as perpetual, yet being always remissable at the pleasure of the King, or other competent authority, cannot be considered to constitute any real aggravation of punishment.

"7. Since the court cannot resist the force of these considerations, they do humbly submit that they are unconscious of having deviated from the statute, or of having encroached on his Lordship's prerogative of mitigating punishments. Nevertheless, in deference to his Lordship's judgment, the court have substituted the word *cashiered* for *dismissed*, though after mature reflection, they have been unable to recognize any difference in the signification of the two words.

"G. YOUNG, Dep. Judge Advocate General."

Hough, in his work on the Practice of Courts-Martial, (1825) takes the opposite ground from that maintained in the opinion just quoted, but occasionally loses sight of it, showing how difficult it was to adapt the advocated theory to the facts. Thus, in speaking of reduction, (p. 388-9) he says: "If an officer of the rank of colonel, lieutenant-colonel, major, captain or lieutenant, were to be reduced in rank, and made the youngest *ensign* of his regiment, such a sentence would, in effect, amount to his being *cashiered*, dismissed. or discharged, and the *immediately granting him a new commission.*"

And again in a note on the sentence in Lieutenant-General Whitelocke's case, [Prac. of Courts-Martial, p. 357] Hough distinctly assumes that disqualification is not involved in simple

cashiering. The sentence in that case was: "that the said Lieutenant-General Whitelocke be *cashiered*, and declared totally unfit and unworthy to serve His Majesty in any military capacity whatever;" upon which Hough remarks: "It does not appear to be improper for a court to declare it to be *their opinion*, that the prisoner is unworthy, &c., leaving it to the judgment of the Commander-in-Chief to approve of such opinion, and confirm such addition to the sentence. A court may, of course, express an *opinion*; but they cannot make the above *disqualification* a *component part* of *their sentence;* except in such cases so declared by the Mutiny Act." The italicizing is that of the work from which this quotation is copied.

Notwithstanding, however, the action on the cases of Captain Barnes and Major W. J. M., 9th regiment, N. I., there is abundant proof that, even in England, simple cashiering and dismissal have been practically treated as of the same effect; that no incapacity was in general regarded as attaching to either except by express declaration of the sentence; and that it was not considered more appropriate to the one than to the other.

The cases of Lieutenant-General Whitelocke and Assistant Surgeon Talbot, (1808), Lieutenants Huddlestone and Maxwell, (1811), and Ensign Johnstone, (1812), show that when it was the intention to attach incapacity to cashiering, it was done by express declaration; and, in a large number of cases, the incapacity has been made to follow dismissal. James, in his "Collection of Charges, Opinions, and Sentences," mentions twenty such cases, the incapacity in most of them being for all service, but in some for military service only. Another proof that simple cashiering did not involve incapacity is the restoration without the rehabilitation of a pardon, of cashiered officers—as in the case of Lieutenant McNair, of the 5th West India regiment, in 1816.

That, in English practice, these two sentences have not generally been regarded as of different degrees of severity, may be inferred from their indiscriminate use, and the fact that when courts were at liberty to award either, and the circumstances were such that, had there been any difference, they would natu-

rally have awarded the lighter, they, nevertheless, *cashiered*, as in the case of Paymaster Price (1807), whom, "in consideration of his youth, inexperience, and of the very great provokation and insults he had received," the court recommended to mercy. Again, of three officers of the 48th regiment, tried in 1811, on *joint charges*, the one who was evidently the most guilty was sentenced "to be *dismissed* His Majesty's service, with infamy, and rendered incapable of serving His Majesty in any capacity whatever," whilst the others were simply *cashiered*. Moreover, the two words have been distinctly used as interchangeable. Thus, in the case of Sir Charles Hotham, Bart., "cashiered" in 1808, it was announced that "His Majesty has, * * * been most graciously pleased to declare his great regret on feeling the necessity of *dismissing* from his service an officer, &c., &c."

If there is any difference in the degree of disgrace between Cashiering and Dismissal, there must be some difference also between Dismissal, Discharge, and Removal. The latter has not been mentioned by English text writers as a sentence appropriate to commissioned officers, but there are instances of it, as in the case of Lieutenant Wrey, of the 19th Light Dragoons; and it has been treated as involving a lesser degree of disgrace than dismissal, for, in 1812, the Prince Regent mitigated a sentence of dismissal to removal. We would thus have, in the English service, four different degrees of expulsion, viz: Cashiering, Dismissal, Discharge, and Removal. Yet it is a singular fact, that if such a difference exists it is not at all recognized by the military courts—each of these sentences having been awarded on charges affecting the character of the accused as an officer and a gentleman, without any apparent reason for selecting the one in preference to the others. In aggravated cases of "scandalous and infamous conduct" the sentence has sometimes been "Discharge;" indeed this was formerly the statutory penalty affixed to the offence; and yet under the article relating to it, more than under any other, have officers been convicted of acts *morally* unfitting them for future contact with honorable men. Again, when the intention has been to make the expul-

sion peculiarly disgraceful, the officer has been, not *cashiered*, but "dismissed with ignominy," "with the greatest ignominy," or "with all possible ignominy."

O'Brien [on military law, p. 275] adopts the following classification:

"*Cashiering* is the most severe of the inferior punishments peculiar to commissioned officers. By cashiering is meant depriving an officer of his commission, breaking him, and taking from him his military character. The older writers also state that the punishment of *cashiering* carries with it an incapacity afterwards to hold *military* rank. This, it seems to us, is the better opinion, and establishes the only distinction between cashiering and disunissal. It has, however, been asserted by some military writers, that no such disability is incurred by that sentence.

"*Dismissal* is the next punishment. This also deprives the officer of his military character. It is a disgraceful discharge.

"*Discharging an officer* is another mode of depriving an officer of his military character, but the same idea of disgrace does not attach to this sentence as to *cashiering* and *dismissal*. The sentence may be inflicted for crimes not disgraceful in themselves."

But the distinction which O'Brien here makes between Cashiering and Dismissal is really that which exists between Cashiering and Dismissal *with disqualification* on the one hand, and Cashiering *simpliciter*, and Dismissal, on the other. If there is anything settled about this question at all, it is that there are at least two degrees of cashiering, the lowest of which does not carry with it incapacity for future military employment. It cannot, therefore, be this incapacity that distinguishes this degree of cashiering from dismissal; nor has it been so maintained by those who recognize the existence of different degrees of cashiering. Yet they say a difference does exist; though, apparently, of so intangible a nature as to defy definition. In truth none does exist, for if disqualification be not the distinctive feature of *all* cashiering, none can exist.

Under the American articles of war now in force there may be said to be two kinds of dishonorable expulsion from the service of an officer by sentence of court-martial:

1. Simple Dismissal or Cashiering, which are identical in effect, and involve no incapacity for future military employment.

2. Dismissal or Cashiering, with disqualification. This may be either by express declaration in the sentence, under articles making the punishment discretionary; or by virtue of the legal effect of the articles which specifically annex disqualification to dismissal. These are the 5th, 14th, and 15th, and, perhaps, all cases of dismissal or cashiering for cowardice or fraud should be included under this head, in consequence of the provisions of Article 100, which makes it scandalous for officers to associate with persons so convicted, after the required publication of the sentence in the newspapers. The disqualification in all of these cases may be removed by pardon, for even in those cases where it is specifically affixed to dismissal by statute, it is to be remembered that, although within certain general limits Congress may prescribe the qualifications for office, it cannot do so in such a way as to interfere with the pardoning power of the President. A pardon reaches both the punishment prescribed for the offence and the guilt of the offender; and when the pardon is full, it releases the punishment and blots out the existence of the guilt; so that in the eye of the law the offender is as innocent as if he had never committed the offence. If granted after conviction, it removes the penalties and disabilities, and restores him to all his civil rights; it makes him, as it were, a new man, and gives him a new credit and capacity. There is only one limit to its operation; it does not restore offices forfeited, or property or interests vested in others in consequence of the conviction and judgment. Congress cannot inflict punishment beyond the reach of executive elemency. *Ex parte* Garland, 4 Wallace, 381.

There is, indeed, a doctrine which, however, Bishop (Criminal Law) speaks of as not well defined and not satisfactory in itself, that a disability, imposed expressly by statute as a consequence of the offence, is not taken away by a pardon. This

doctrine is founded on English cases, and is not consistent with our federal system under which Congress is not, like Parliament, politically omnipotent, but is controlled by a higher political power—the Constitution.

The word "cashier" is derived through the French *casser*, from the Latin *cassus*, meaning, originally, empty, hollow, void, and then useless, good-for-nothing. Like the French word, it seems at first to have been used as simply signifying disbandment or discharge. [See Samuel, p. 628.]

Thus, the Parliamentary articles of 1642, contained the following provision: "After the army is come to the general rendezvous no captaine shall *casheer* any souldier that is enrolled, without special warrant of the Lord Generall." And in Rushton's Historical Collections the word is also to be found, used synonymously with *discharge*. It afterwards, however, came to mean an ignominious separation from the service, or dismissal, whether by act of the sovereign, in the exercise of his prerogative, or through the medium of a sentence of a court-martial. As referring to this time, therefore, the definition given by Major James would be correct. "An officer," he says, "sentenced by a general court-martial, or peremptorily ordered by the King, to be dismissed from the service, is said to be cashiered." But at present the word is applied to expulsion by sentence only, not to peremptory dismissal by the King. *Dismissal* may, however, be by either means. So that the definition given in Scott's Military Dictionary is now more nearly correct, viz: "When an officer is sentenced by a court-martial to be dismissed the service, he is said to be cashiered." Yet, though this is still the law in England, it is nevertheless true that the tendency there is in exactly the opposite direction from ours; we showing a disposition to substitute "dismissal" for "cashiering;" and the English to adhere to "cashiering" as expressive of expulsion from the army by sentence of court-martial. At least such seems to be the case when we examine the British Articles of War, in which the punishment of "cashiering" is affixed to fifty-seven offences, and that of "dismissal" specifi-

cally to none; leaving it a legal sentence only where the punishment is discretionary.

There can be no doubt of the correctness of the view that, so far as our service is concerned, simple "cashiering" and "dismissal" are identical in their effect. The articles of war themselves prove this. The 65th of the old, and the 106th of the new, articles provide that in time of peace no sentence of a court-martial directing the "dismission" or "dismissal" of an officer shall be carried into effect, until confirmed by the President. This of course included cashiering, and shows that no distinction is recognized. Except under the 5th, 6th and 14th Articles of War, and, possibly, under the 100th, nothing is necessary to the restoration of an officer either "cashiered" or "dismissed," save reappointment, and confirmation by the Senate; Sec. 1228 of the Revised Statutes, in speaking only of officers "dismissed," being evidently intended to include "cashiered" officers, as mentioned in the act on which it is founded. De Hart says: "That there was no difference intended as to the effect of a sentence, in which either the one or the other term is employed, may be safely inferred from the fact, that whenever incapacity for future service is meant, such purpose is clearly declared."

By the resolutions of Congress, of November 7, 1775, it was declared that "all commissioned officers found guilty by a general court-martial of any fraud or embezzlement, shall forfeit all his pay, be *ipso facto* cashiered, *and* deemed unfit for farther service as an officer;" and that "all commissioned officers" found guilty of embezzling stores taken from the enemy shall likewise "forfeit all his pay, be *ipso facto* cashiered, *and* deemed unfit for farther service as an officer"—showing that the unfitness was not included in the word *cashiering*.

But if there be no difference, it becomes a question whether we are not abandoning the better word. "Cashiering," has by long usage become an expressive term. Without regard to ulterior legal effects, it certainly means expulsion of a commissioned officer from the army by sentence of a court martial. The single word conveys that idea. But this is not true of

"Dismissal," to which it is necessary to add words of qualification in order to give it its full meaning, as "dismissed the service of the United States." In the Articles of War themselves the word is not always used with the same signification. Thus in the 33d it is made an offence to leave the place of parade &c., before being "dismissed." Why then adhere to a term which in itself is not significant of the act, and abandon one which by time-honored usage has become, as a term of military law, unmistakably distinctive?

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